No. 19-619

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Petitioners,

v.

BRYCE CALDWELL, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

BRIEF FOR PETITIONERS

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Oral Argument

QUESTIONS PRESENTED

1. Whether the Indian Child Welfare Act and the final rule implementing the Act violate equal protection.

2. Whether the Indian Child Welfare Act and the final rule implementing the Act violate the anticommandeering doctrine.

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JURISDICTION

The judgment of the United States Court of Appeals for the Ames Circuit was entered on August 12, 2019. The petition for writ of certiorari was granted on September 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

All relevant provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

This case involves two constitutional challenges to a decades-old statute, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–63. Congress enacted ICWA in 1978 to establish standards and procedures to prevent the unjust removal of Indian children from their families and tribes.

In its decision below, the Ames Circuit upended longstanding precedent by concluding that ICWA violates equal protection. *Morton v. Mancari* established a binding rational relationship standard of review for legislation, like ICWA, that is directed at members of Indian tribes. *See* 417 U.S. 535, 555 (1974). The Ames Circuit, however, declined to apply this standard of review. Instead, it applied strict scrutiny and held that ICWA impermissibly discriminates on the basis of race by providing special treatment to members of federally recognized tribes.

The court reached a similarly novel conclusion in holding that ICWA violates the anticommandeering doctrine. Glossing over Congress' preemption authority, the Ames Circuit found that ICWA commandeers state courts by "impermissibly chang[ing] the content of state family codes." *See* J.A. at 10. The court also found that ICWA's procedural guarantees violate the anticommandeering doctrine because they impose obligations on state agencies.

The Ames Circuit's opinion contravenes long-settled understandings regarding the scope of federal power in the field of Indian affairs and under the Supremacy Clause. This Court should reverse.

The Federal-Tribal Trust Relationship

The Framers of the Constitution vested Congress with the "sole and exclusive right" of negotiating treaties and regulating commerce with the sovereign Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). Out of this broad power grew a special trust relationship between the federal government and the tribes with which it made treaties. *See United States v. Kagama*, 118 U.S. 375, 383–84 (1886). Congress has acted to fulfill this trust obligation by legislating in a wide variety of areas that affect these tribes and their members. *See, e.g.*, 25 U.S.C. § 1621b (health promotion and disease prevention for tribal Indians); 25 U.S.C. § 2502 (grants for tribally controlled schools); 25 U.S.C. § 3203 (child abuse prevention in tribal communities).

Pre-ICWA Policy Regarding Indian Children

One area in which Congress long has been active is Indian child welfare. Beginning in the late 1880s, the federal government pursued an assimilationist policy of forcibly removing Indian children from their homes and placing them in boarding schools that banned native languages and traditional religious practices. *See* Matthew L.M.

Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 891 (2017). The federal government shifted away from this model in the mid-twentieth century. *See id.* State courts and state child protective agencies, however, continued to separate Indian children from their families. *See id.* Studies conducted in 1969 and 1974 indicated that state social workers unfamiliar with Indian culture removed 25–35% of all Indian children from their homes and placed over 90% of those children in non-Indian adoptive or foster homes. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32–33 (1989).

Congressional investigation revealed that states "often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). This failure resulted in "an alarmingly high percentage of Indian families . . . broken up by the removal, often unwarranted, of their children." *Id.* § 1901(4). The practice of removing Indian children from their homes not only created "serious adjustment problems" for the children themselves but also threatened the "continued existence and integrity of Indian tribes." *See Holyfield*, 490 U.S. at 33, 35.

ICWA and the Final Rule

In direct response to these "abusive child welfare practices," Congress passed ICWA in 1978. *See id.* at 32. The Act establishes

"minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes." 25 U.S.C. § 1902. Those standards include placement preferences for adoptive children, *id.* § 1915; the right of Indian families to receive remedial services before an Indian child can be placed in foster care, *id.* § 1912(d); the right of tribes to intervene in proceedings involving their members, *id.* § 1911(c); and the right of adopted children to learn of their tribal affiliations from court records, *id.* §§ 1917, 1951. ICWA's standards apply in all child welfare actions involving children enrolled in federally recognized tribes, as well as actions involving children who are both eligible for enrollment and have a biological parent enrolled in a tribe. *See id.* § 1903(4).

ICWA empowers the Secretary of the Interior to "promulgate such rules and regulations as may be necessary to carry out" its provisions. *See id.* § 1952. In 2016, the Secretary exercised this authority and issued a final rule implementing the statute and clarifying its provisions. *See* Indian Child Welfare Act Proceedings, 25 C.F.R. §§ 23.1–23.144. Most notably, the rule specifies what circumstances constitute "good cause" to depart from ICWA's standards. *See id.* §§ 23.103(c), 23.132.[1]

[1] Plaintiffs-Respondents challenge the final rule only on equal protection and anticommandeering grounds—the same grounds on which they challenge the statute itself. *See* J.A. at 23–24. Accordingly, for the purposes of this brief, we refer to both the statute and the rule together as "ICWA" or "the Act" throughout.

Facts of the Case

C.J. was born on February 6, 2014. J.A. at 19. While his biological mother is not a tribe member, his biological father is an enrolled member of the Akava Nation, a federally recognized tribe with a reservation in the State of Ames. *Id.* Four months after C.J.'s birth, the Ames Department of Family and Protective Services (ADFPS) removed him from his biological mother's custody and placed him in foster care with the Caldwells, a non-Indian couple. *Id.* ADFPS was unaware of C.J.'s tribal affiliation at the time of this placement. *Id.*

In December 2016, a state court terminated the parental rights of C.J.'s biological parents. *Id.* During the termination proceeding, ADFPS learned of C.J.'s tribal affiliation and, pursuant to ICWA, notified the Akava Nation of his placement with the Caldwells. J.A. at 4–5. When the Caldwells petitioned to adopt C.J. in February 2017, the Akava Nation identified an alternative adoptive placement with members of the Sousetta Tribe, another federally recognized tribe with a reservation in the State of Ames. J.A. at 5, 18. Because of their tribal membership, this alternative couple constituted a preferred placement under ICWA. *Id.* Accordingly, the state court denied the Caldwells' adoption petition. *Id.*

Following this decision, the alternative adoptive father experienced unexpected health issues, causing the alternative couple to

voluntarily dismiss their petition to adopt C.J. *Id.* The Akava Nation subsequently located an alternative foster-care placement for C.J. with a different Sousetta Tribe member. J.A. at 21. In May 2017, the state court granted a temporary order staying any change in C.J.'s placement pending resolution of the Caldwells' appeal of their adoption petition. J.A. at 5. That appeal is stayed pending resolution of the present constitutional challenges to ICWA. J.A. at 21.

Proceedings Below

The Caldwells and the State of Ames jointly filed suit against the United States Department of the Interior and related parties in the United States District Court for the District of Ames. J.A. at 12. Their complaint sought an injunction and a declaration that ICWA violates equal protection and the anticommandeering doctrine. J.A. at 24. Plaintiffs and Defendants both moved for summary judgment. J.A. at 30. Finding no dispute of material fact, the district court granted the Department of the Interior's motion, concluding that ICWA does not violate equal protection or the anticommandeering doctrine. *See id.*

The United States Court of Appeals for the Ames Circuit reversed, creating a split of authority with the Fifth Circuit's recent decision in *Brackeen v. Bernhardt*, 937 F.3d 406 (5th Cir. 2019). J.A. at 11. This Court granted certiorari on both the equal protection and anticommandeering issues. J.A. at 1.

SUMMARY OF THE ARGUMENT

I. ICWA does not violate equal protection. The standards that it establishes are an appropriate means of fulfilling the federal government's unique trust obligation to Indian tribes. Accordingly, ICWA satisfies the requirements of the controlling rational relationship test and, alternatively, strict scrutiny.

A. The rational relationship test articulated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), is the correct standard under which to review classifications based on affiliation with a federally recognized tribe. Under that test, such classifications are upheld if they can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.* This test is grounded in the text and original understanding of the Constitution, which treats Indians as a distinct political class. Recognizing this framework, *Mancari* made clear that classifications singling out members of federally recognized tribes for special treatment are "political rather than racial in nature." *See id.* at 553 n.24. Contrary to the Ames Circuit's assertion below, this Court consistently has reaffirmed the application of *Mancari*'s rational relationship test to legislation singling out individuals affiliated with federally recognized tribes.

B. ICWA both qualifies for and satisfies *Mancari*'s rational relationship test. Much like the classification at issue in *Mancari*, ICWA

is directed only at individuals affiliated with federally recognized tribes—not Indians "as a discrete racial group." *See id*. at 554. Further, ICWA is tied rationally to Congress' unique obligation toward Indians, as it protects the interests of both individual Indians involved in child welfare proceedings and tribes as sovereign entities. The Act thus satisfies *Mancari*'s rational relationship test.

C. But even if this Court were to apply strict scrutiny, ICWA would survive. The Act serves two compelling governmental interests: fulfilling the federal government's trust obligation toward tribes and remedying past government discrimination. ICWA's provisions, including the two to which the Ames Circuit objected, are narrowly tailored to serve these interests. First, ICWA's inclusion of tribe members' children who are themselves eligible for enrollment is necessary to protect those children too young to "make a reasoned decision about their tribal and Indian identity." *See* H.R. Rep. No. 95-1386, at 17 (1978). Second, the adoptive and foster placement preferences are narrowly tailored to protecting children and tribes from the harm caused by the "[r]emoval of Indians from Indian society." *See* S. Rep. No. 95-597, at 43 (1977).

II. ICWA does not violate the anticommandeering doctrine. The Act neither directs state legislatures nor conscripts state executive officers. Instead, it preempts state regulation by establishing procedures and

standards that apply with equal force to public and private actors. This kind of legislation falls squarely within Congress' enumerated powers. Accordingly, the Supremacy Clause demands that state courts enforce ICWA's provisions.

A. ICWA validly preempts state law and thus does not violate the anticommandeering doctrine. The Act is a legitimate exercise of Congress' plenary power over Indian affairs. In enacting ICWA, Congress used this power to confer rights on private actors in the context of Indian child welfare proceedings. These rights take the form of procedural guarantees and corresponding restrictions that apply with equal force to both public and private advocates for Indian children. The anticommandeering doctrine does not apply to this kind of legislation, which "evenhandedly regulates an activity in which both States and private actors engage." *See Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1478 (2018).

B. That state courts must enforce ICWA does not implicate the anticommandeering doctrine. While ICWA does, in a sense, direct state courts to enforce its provisions, "this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause." *See New York v. United States*, 505 U.S. 144, 178–79 (1992). This analysis does not change simply because ICWA preempts state family law and uses directive language in reference to state courts.

C. Finally, ICWA does not implicate any of the three rationales animating the anticommandeering doctrine. First, ICWA's provision of rights does not raise structural liberty concerns, which are largely inapposite in the context of Indian affairs. Second, ICWA does not create confusion regarding political accountability, as the Act applies only to child welfare actions involving Indian children. And third, any costs imposed on states by ICWA are incidental and do not raise anticommandeering concerns.

III. Any provision of ICWA deemed unconstitutional would be severable from the Act. Congress' inclusion of a severability clause in ICWA evinces its intent that the validity of the Act not depend on any one provision.

This Court should reverse.

ARGUMENT

I. ICWA Does Not Violate Equal Protection.

The government may not "deny to any person within its jurisdiction the equal protection of the laws." *See* U.S. Const. amend. XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). When considering whether a statute violates equal protection, this Court applies different levels of scrutiny depending on the nature of the classification at issue. Legislation based on racial classifications is "inherently suspect" and subject to strict scrutiny, which requires that the law in question be narrowly tailored to serve a compelling governmental interest. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 299 (1978). By contrast, statutes that provide for the special treatment of Indians affiliated with federally recognized tribes are subject to a variant of rational basis review that requires that "the special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

ICWA does not violate equal protection. The rational relationship test articulated in *Mancari* is the appropriate standard under which to review classifications based on affiliation with a federally recognized tribe. *Mancari* has been neither overruled nor narrowed, and it remains the governing standard of review. Because ICWA classifies individuals on the basis of affiliation with a federally recognized tribe, the rational

relationship test controls here. The minimum federal standards that ICWA establishes for Indian child welfare actions are tied rationally to Congress' fulfillment of its unique obligation toward Indian tribes, thus satisfying the *Mancari* test. But even under strict scrutiny, ICWA is sufficiently narrowly tailored to compelling governmental interests to pass muster. Regardless of the level of scrutiny that this Court applies, ICWA does not violate equal protection.

A. *Mancari* provides the appropriate standard of review for classifications based on affiliation with a federally recognized tribe.

In *Mancari*, this Court held that legal classifications affording special treatment "to members of 'federally recognized' tribes" are "political rather than racial in nature." 417 U.S. at 553 n.24. "Federal regulation of Indian tribes . . . is governance of once-sovereign political communities" rather than "legislation of a 'racial' group consisting of 'Indians.'" *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S. at 553 n.24). Accordingly, this Court upholds laws directed at members of federally recognized tribes as long as those laws "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

Mancari's rational relationship test is the appropriate standard under which to review classifications based on affiliation with a federally recognized tribe for three reasons. First, the test is grounded in the text and original understanding of the Constitution, which singles

out Indian tribes as a distinct political class. Second, the test appropriately accounts for the inherently political nature of classifications based on membership in a federally recognized tribe. And third, this Court consistently has reaffirmed the validity of *Mancari*'s rational relationship test.

1. The Constitution treats Indian tribes as a distinct political class.

The text of the Constitution reflects the Framers' understanding of Indian tribes as a unique political class. For example, the Apportionment Clause excludes "Indians not taxed" from those counted for the purpose of allocating congressional representatives. U.S. Const. art. I, § 2, cl. 3. This exemption reflects the original understanding of Indian tribes as "distinct political communities" whose members "were not part of the people of the United States." *Elk v. Wilkins*, 112 U.S. 94, 99 (1884); *see also* 1 *Cohen's Handbook of Federal Indian Law* § 5.01(1) (2019) (noting that the Apportionment Clause "indicate[s] an understanding of the separate status of tribes as sovereign entities"). Unlike slaves, who were "counted at a ratio of three-fifths of all other persons," Indians were altogether excluded as "separate and sovereign peoples, who were simply not part of the state polities." *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1149–50 (1995).

The Commerce Clause and the Treaty Clause similarly treat Indians as a distinct political class. The Commerce Clause grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Framers drafted the clause's third provision, known as the Indian Commerce Clause, "[i]ntending to give the whole power of managing [Indian] affairs to the government." *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831). This broad grant of authority is separate from Congress' commerce powers relating to foreign nations and the states, reinforcing the special status of Indian tribes within the constitutional framework. Moreover, the Treaty Clause grants the federal government the power to make treaties with both foreign nations and Indian tribes. U.S. Const. art. II, § 2, cl. 2; *Worcester v. Georgia*, 31 U.S. 515, 559 (1832). In this way, the Framers treated Indian tribes and foreign nations alike—as sovereign political entities. *See Worcester*, 31 U.S. at 559–60.

Interpreting this framework, this Court's early cases consistently characterized Indian tribes as "distinct, independent political communities." *See id.* at 559; *see also Cherokee Nation*, 30 U.S. at 16 (describing the Cherokee as "a distinct political society"). The position of tribes as sovereign entities within the boundaries of the United States gave rise to a special trust relationship in which the tribes took on the

status of "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17. The "condition of the Indians, in relation to the United States" is thus "unlike that of any other two people in existence." *Id.* at 16.

The ratification of the Fourteenth Amendment did not change the unique status of Indian tribes under the Constitution. While section 2 of the Fourteenth Amendment superseded the Apportionment Clause and removed the provision treating slaves as three-fifths persons, it retained the exclusion of "Indians not taxed." *See* U.S. Const. amend. XIV, § 2. Moreover, the very Congress that framed the Fourteenth Amendment used the same language excluding "Indians not taxed" two years earlier in the Civil Rights Act of 1866. *Elk*, 112 U.S. at 102; *see* Civil Rights Act of 1866, 14 Stat. 27-30, § 1 (1866) (codified at 42 U.S.C. § 1981). This singling out of Indian tribes in both the Civil Rights Act and the Fourteenth Amendment itself indicates that the drafters intended to maintain the status of tribes as separate political communities.

2. Classifications based on membership in a federally recognized tribe are inherently political.

Recognizing the unique status of Indians in the Constitution, this Court made clear in *Mancari* that classifications based on membership in a federally recognized tribe are fundamentally "political rather than racial in nature." *See* 417 U.S. at 553 n.24. Accordingly, *Mancari*'s rational relationship test "permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise

be constitutionally offensive" were it based on racial classifications. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Because federal recognition of tribes is a political act and membership in a federally recognized tribe is not a proxy for race, *Mancari* draws an appropriate distinction between political and racial classifications.

a. Federal recognition of Indian tribes is a political act.

When the United States recognizes an Indian tribe, it performs "a formal political act confirming the tribe's existence as a distinct political society[] and institutionalizing the government-to-government relationship between the tribe and the federal government." 1 *Cohen's Handbook*, *supra* § 3.02(3). The United States government currently recognizes 573 Indian tribes. *See* Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200 (Feb. 1, 2019). These federally recognized tribes are "eligible for . . . special programs and services provided by the United States." 25 U.S.C. § 5131; *see* 25 U.S.C. § 1903(11). The more than 100,000 members of Indian tribes that are not federally recognized, however, are not eligible for such services. *See* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States,* 12 Stan. L. & Pol'y Rev. 271, 276 (2001). This differential treatment is not based on race but

rather reflects the political relationship between certain tribes and the federal government.

b. Membership in a federally recognized tribe is not a proxy for race.

Over 5.2 million people in the United States self-identify as American Indian or Alaska Native. *See* U.S. Census Bureau, C2010BR-10, *The American Indian and Alaska Native Population: 2010* (2012). By contrast, only 2.9 million people belong to federally recognized tribes. *See Tribal Population*, Centers for Disease Control and Prevention (Dec. 21, 2018), https://www.cdc.gov/tribal/tribes-organizations-health/tribes/state-population.html. Moreover, nearly half of those who identify as Indian also identify as at least one other race, *see* U.S. Census Bureau, *supra*, and some tribes extend membership to individuals without "Indian blood," such as descendants of former slaves or adopted white persons, *see* Margo S. Brownell, *Who Is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. Mich. J.L. Reform 275, 280 (2001). Because enrollment in a federally recognized tribe does not map neatly onto any one racial group, classifications based on enrollment status cannot serve as proxies for racial classifications.

3. This Court consistently has applied and upheld *Mancari*.

This Court consistently has reaffirmed the application of *Mancari*'s rational relationship test to legislation singling out federally

recognized Indian tribes. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495, 520 (2000); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *Antelope*, 430 U.S. at 646; *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 85 (1977); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479–80 (1976); *Fisher v. District Court*, 424 U.S. 382, 390–91 (1976).

Contrary to the Ames Circuit's contention, *Mancari* has been neither overruled nor narrowed by subsequent cases. In *Adarand Constructors, Inc. v. Pena*, this Court applied strict scrutiny to a program that provided a preference for "socially and economically disadvantaged individuals" in awarding federal construction contracts. 515 U.S. 200, 205 (1995). "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" all presumptively qualified for the preference. *Id.* But the law did not draw any distinction between Indians who were members of federally recognized tribes and those who merely identified as Native American. *See id.* Accordingly, the Court's opinion in *Adarand* did not address *Mancari*'s holding regarding classifications based on tribal membership. Indeed, it did not cite to *Mancari* at all. The Ames Circuit's suggestion that *Adarand* "effectively overruled" *Mancari*, *see* J.A. at 7, thus finds no support in the language of this Court's opinion. Moreover, this Court

extensively relied on *Mancari* five years after *Adarand* in *Rice*, making clear that *Adarand* could not have overruled *Mancari*.

In *Rice*, this Court invalidated a Hawaii state law limiting the right to vote in certain statewide elections to descendants of native Hawaiians. *See* 528 U.S. at 524. In so doing, this Court distinguished the classification in the Hawaii law from the classification upheld in *Mancari*. *See id.* at 520. Rather than turning on membership in a federally recognized tribe, the Hawaii statute was directed at native Hawaiian "peoples" for an "express racial purpose." *Id.* at 515–17. This Court declined to extend *Mancari*, which applies only to individuals affiliated with federally recognized tribes, "to a new and larger dimension" covering all descendents of native peoples. *Id.* at 520. The Court made no indication, however, that it sought to narrow *Mancari*'s rational relationship test.[2]

This Court should reject the Ames Circuit's erroneous interpretations of *Adarand* and *Rice*. A contrary holding would call into

[2] Every federal and state appellate court to address the issue has agreed that *Rice* "reaffirm[ed] the core holding of [*Mancari*]." *See United States v. Wilgus*, 638 F.3d 1274, 1287 (10th Cir. 2011); *see also Brackeen v. Bernhardt*, 937 F.3d 406, 429 (5th Cir. 2019); *KG Urban Enterprises, LLC v. Patrick*, 693 F.3d 1, 18 (1st Cir. 2012); *United States v. Garrett*, 122 F. App'x 628, 632–33 (4th Cir. 2005) (unreported); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279 (9th Cir. 2004); *American Fed'n of Gov't Emps. v. United States*, 330 F.3d 513, 520–21 (D.C. Cir. 2003); *Corboy v. Louie*, 283 P.3d 695, 705 n.23 (Haw. 2011); *Flynt v. California Gambling Control Comm'n*, 129 Cal. Rptr. 2d 167, 180–81 (Cal. Ct. App. 2002).

question the "entire Title of the United States Code" dedicated to Indian affairs and undermine "the solemn commitment of the Government toward the Indians." *See Mancari*, 417 U.S. at 552.

B. ICWA qualifies for and satisfies *Mancari*'s rational relationship test.

ICWA qualifies for *Mancari*'s rational relationship test. The Act applies only in child welfare actions involving children affiliated with federally recognized tribes, employing the kind of political classification that this Court reviews under *Mancari*. Much like the hiring preference for members of federally recognized tribes at issue in *Mancari*, ICWA is directed at "members of quasi-sovereign tribal entities" rather than Indians "as a discrete racial group." *See id.* at 554. ICWA makes no mention of race, blood quantum, or ancestry. Instead, it applies only to current or potential members of "'federally recognized' tribes[,] . . . exclud[ing] many individuals who are racially to be classified as 'Indians.'" *See id.* at 555 n.24.

That ICWA applies to children who live off-reservation and to children who are eligible for tribal membership but not yet enrolled does not support the Ames Circuit's conclusion that the Act is race-based. Neither of these factors changes the equal protection analysis. "Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States." *United States v. Ramsey*, 271 U.S. 467, 471 (1926). Congress'

use of this power in enacting ICWA does not create a racial classification but instead demonstrates Congress' intent to protect all members of federally recognized tribes regardless of their location. Moreover, ICWA's inclusion of enrolled tribe members' children who are themselves eligible for enrollment is not a race-based classification. The child of a tribe member is included not because she shares her parent's race but because she shares her parent's political affiliation with a tribe. Applying ICWA to a child who is both eligible for tribal enrollment and the biological child of an enrolled tribe member is analogous to granting United States citizenship to the child of a United States citizen—a non-racial, political act. *See* 8 U.S.C. § 1401.

Because ICWA is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," it satisfies *Mancari*'s rational relationship test. *See* 417 U.S. at 555. In enacting ICWA, Congress established minimum standards for the removal of Indian children from their homes and preferences designed to keep these children connected with Indian culture. *See* 25 U.S.C. § 1902. ICWA furthers the goal of "Indian self-government" by ensuring the continued survival of tribes. *See Mancari*, 417 U.S. at 550. The Act reflects the reality "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 35 (1989) (quoting 25 U.S.C.

§ 1901(3)). In light of the federal government's direct interest in protecting both enrolled and eligible members of Indian tribes, ICWA is a rational means of fulfilling "Congress' unique obligation toward the Indians." *See Mancari*, 417 U.S. at 555. It thus does not violate equal protection.

C. Even under strict scrutiny, ICWA does not violate equal protection.

To withstand strict scrutiny, legislation that classifies individuals on the basis of race must serve a compelling governmental interest and be narrowly tailored to that interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). ICWA furthers compelling governmental interests and is narrowly tailored to those interests. Thus, even if ICWA were subjected to strict scrutiny, it would survive.

1. ICWA serves two compelling governmental interests.

a. ICWA serves to fulfill the federal government's trust obligation to tribes.

The government's "distinctive obligation of trust" to tribes is a defining feature of federal-tribal relations. *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). As part of this trust obligation, the federal government "'has a real and direct interest' in the guardianship it exercises over the Indian tribes." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) (quoting *United States v. Minnesota*, 270 U.S. 181, 194 (1926)). Courts conducting strict

scrutiny analyses thus have had "little trouble finding a compelling interest in protecting Indian cultures from extinction." *See United States v. Hardman*, 297 F.3d 1116, 1128 (10th Cir. 2002); *see also American Fed'n of Gov't Emps. v. United States*, 104 F. Supp. 2d 58, 75 (D.D.C. 2000).

ICWA serves this compelling interest by "protect[ing] the rights of the Indian child . . . and the rights of the Indian community and tribe in retaining its children in its society." *See Holyfield*, 490 U.S. at 37 (quoting H.R. Rep. No. 95-1386, at 23 (1978)). Removing Indian children from their families and placing them in non-Indian homes "seriously undercut[s] the tribes' ability to continue as self-governing communities." *Id.* at 34 (quoting *Hearing on S. 1214 Before the Subcommittee on Indian Affairs and Public Lands*, 95th Cong. 193 (1978)). The government thus has a "direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." 25 U.S.C. § 1901(3). By preventing the "wholesale removal of [Indian] children by nontribal government and private agencies," ICWA shields tribes from a "serious threat to their existence as ongoing, self-governing communities." 124 Cong. Rec. 38103 (1978).

b. ICWA serves to remedy past government discrimination.

The federal government "has a compelling interest in remedying past discrimination for which it is responsible." *See Fisher v. University of Tex. at Austin*, 570 U.S. 297, 317 (2013) (Scalia, J., concurring); *see also Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion). Although "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," the government may utilize such a remedy if it "has convincing evidence that remedial action is warranted." *Wygant*, 476 U.S. at 276.

There is sufficient evidence of past government-perpetrated discrimination in the area of Indian child welfare to justify ICWA's special treament of Indians. Government social welfare agencies unfamiliar with Indian culture "consistently thought that it was better for the child to be out of the Indian home whenever possible." *Hearing on S. 1214 Before the Senate Select Committee on Indian Affairs*, 95th Cong. 73 (1977). Congress passed ICWA in response to these "abusive child welfare practices," which had resulted in an "adoption rate of Indian children . . . eight times that of non-Indian children." *Holyfield*, 490 U.S. at 32–33. Remedying this past discrimination is a compelling interest for the federal government.

2. ICWA is narrowly tailored to these compelling governmental interests.

Each of ICWA's provisions is narrowly tailored to the compelling interests of upholding the government's trust obligation to federally recognized tribes and remedying past government discrimination. Both provisions called into question by the Ames Circuit—ICWA's definition of "Indian child" and ICWA's preferences for the adoptive placement of Indian children—are narrowly tailored to achieve these compelling interests.

a. ICWA's definition of "Indian child" is narrowly tailored.

ICWA defines an "Indian child" as a minor who either is a member of a federally recognized tribe or is both eligible for membership in a federally recognized tribe and the biological child of a tribe member. *See* 25 U.S.C. § 1903(4). This definition is narrowly tailored. To legislate effectively on issues of Indian child welfare, Congress must be empowered to include not only children already enrolled in federally recognized tribes but also those too young to have "initiate[d] the formal, mechanical procedure necessary" for enrollment. *See* H.R. Rep. No. 95-1386, at 17 (1978). Because such children are unable to "make a reasoned decision about their tribal and Indian identity," they must be included under ICWA to preserve that opportunity. *See id.* With respect to children eligible for tribal membership, the additional requirement of

having an enrolled parent ensures that ICWA covers only those children most likely to form a relationship with a federally recognized tribe.

b. ICWA's placement preferences are narrowly tailored.

ICWA establishes default preferences for the adoptive or foster placement of an Indian child. Unless there is "good cause to the contrary," the Act requires that preference be given first to "a member of the child's extended family," then to "other members of the Indian child's tribe," and finally to "other Indian families." 25 U.S.C. § 1915(a). These placement preferences are narrowly tailored to the government's compelling interests.

ICWA's first preference for adoptive placement with a member of the child's family is narrowly tailored. Placing adoptive children with relatives is widely considered to be the best default choice in any scenario. *See Placement of Children With Relatives*, U.S. Dep't of Health and Human Services (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf. Indeed, the State of Ames similarly has a stated preference for the placement of adoptive children with relatives. *See* Ames Fam. Code § 263.001.

ICWA's second preference for adoptive placement with another member of the child's tribe likewise is narrowly tailored. This preference echoes "the extended family concept . . . in Indian communities," where "there is no such thing as an abandoned child." *See Holyfield*, 490 U.S.

at 35 n.4. Whereas outside of tribal culture a child in need of a guardian might be put up for adoption, in Indian culture, "a relative or a friend will take that child in." *See id.* (quoting *Hearings Before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 93d Cong. 3 (1974)). Devastating consequences often result from "the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society." *Id.* Keeping Indian children with members of their tribes is narrowly tailored to the government's compelling interests by respecting traditional concepts of family in Indian culture and providing for the continued existence of tribes as self-governing communities.

ICWA's third preference for adoptive placement with members of other federally recognized tribes is also narrowly tailored, as tribes often share common histories, cultures, and values. "One of the most serious failings" of the pre-ICWA child welfare model was that removal decisions were made by "nontribal government authorities who ha[d] no basis for intelligently evaluating the cultural and social premises underlying Indian home life." *Holyfield*, 490 U.S. at 34. When enacting ICWA, Congress intended for Indian children to be raised in "adoptive homes which . . . reflect the unique values of Indian culture." *See* 25 U.S.C. § 1902. The goal of keeping Indian children immersed in tribal culture speaks to Congress' finding that the "[r]emoval of Indians from

Indian society has serious long- and short-term . . . social and psychological consequences" for these children. *See* S. Rep. No. 95-597, at 43 (1977) (emphasis added).

While Indian tribes comprise a diverse collection of distinct political entities, "some features are common to Indian cultures, including the greater value placed on the tribal group and the belief that the whole is necessary for the existence of the individual." Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 Am. Indian L. Rev. 329, 333–34 (2009). A preference for placing children in tribal families that are part of Indian society thus helps remedy and prevent the "detrimental impact[s] on . . . [Indian] children" of "placements outside their culture." *Holyfield*, 490 U.S. at 49–50.

Finally, ICWA's adoptive placement preferences are not absolute. State courts are authorized to deviate from these preferences for "good cause." *See* 25 U.S.C. § 1915(a); 25 C.F.R. §§ 23.103(c), 23.132(b). This exception ensures that the preferences are applied only absent clear and convincing evidence that circumstances necessitate a different placement.

* * *

Indian tribes have been singled out for special treatment by the federal government since the founding of this nation. Such special treatment has always been understood to be based on "political rather than racial" classifications. *See Mancari*, 417 U.S. at 553 n.24. Accordingly, this Court has never invalidated on equal protection grounds a law designed to benefit members of federally recognized tribes. It should not do so for the first time here.

II. ICWA Does Not Violate the Anticommandeering Doctrine.

The anticommandeering doctrine stands for the principle that the Constitution grants Congress "the power to regulate individuals, not States." *New York v. United States*, 505 U.S. 144, 166 (1992). Although Congress "has substantial powers to govern the nation directly," *id.* at 162, it may neither "issue directives requiring the States to address particular problems, nor command the States' officers," *Printz v. United States*, 521 U.S. 898, 935 (1997). This limitation is drawn from both the Tenth Amendment and "the basic structure of government established under the Constitution." *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1476 (2018); *see* U.S. Const. amend. X.

The anticommandeering doctrine does not, however, limit Congress' "power to pre-empt or displace state regulation of private activities." *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*,

452 U.S. 264, 290 (1981). The doctrine "does not apply when Congress evenhandedly regulates an activity in which both States and private actors engage." *Murphy*, 138 S. Ct. at 1478. Accordingly, a federal statute that is "best read as one that regulates private actors" may preempt state law without violating the anticommandeering doctrine. *Id.* at 1479.

ICWA is a valid exercise of Congress' authority to preempt state regulation of private actors and thus does not violate the anticommandeering doctrine. Congress has broad authority to legislate in the field of Indian affairs. In enacting ICWA, Congress used this authority to regulate private actors. The Act confers rights on individuals and tribes involved in Indian child welfare proceedings. It also imposes corresponding restrictions that evenhandedly govern the conduct of both public and private actors. While ICWA directs state courts to enforce its provisions, this kind of direction is permissible under the Supremacy Clause and does not violate the anticommandeering doctrine. Moreover, ICWA does not implicate the rationales that animate the doctrine.

A. ICWA validly preempts state law.

A federal statute may preempt state law if it both represents the exercise of one of Congress' enumerated powers and "regulates private actors." *Murphy*, 138 S. Ct. at 1479. Congress need not "employ a particular linguistic formulation when preempting state law." *Coventry*

Health Care of Mo., Inc. v. Nevils, 137 S. Ct. 1190, 1199 (2017). Indeed, even if a statute "appear[s] to operate directly on the States," it does not violate the anticommandeering doctrine so long as it "imposes restrictions or confers rights on private actors." *Murphy*, 138 S. Ct. at 1480.

ICWA satisfies both prongs of this preemption analysis. First, it constitutes a valid exercise of Congress' plenary power over Indian affairs. Second, it confers rights on private parties involved in Indian child welfare proceedings. Although the rights conferred by ICWA take the form of procedural guarantees, "the obligation of states to enforce these [kinds of] federal laws is not lessened by reason of the form in which they are cast." *See Testa v. Katt*, 330 U.S. 386, 391 (1947). Moreover, insofar as ICWA affects state agencies, it does so as a statute of general application.

1. ICWA is a valid exercise of Congress' plenary power over Indian affairs.

The Constitution grants Congress "extraordinarily broad" authority to legislate with regard to Indian tribes and individuals. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). The primary source of this authority is the Indian Commerce Clause, which "provide[s] Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *see* U.S. Const. art. I, § 8, cl. 3. Congress' power under this clause is broader than

its power to regulate interstate commerce and is not subject to the same restraints. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996); *Cotton Petroleum*, 490 U.S. at 192. Moreover, this Court consistently has held that Congress' power over Indian affairs allows it to enact legislation directed at both tribes and "individuals composing those tribes." *See United States v. Holliday,* 70 U.S. 407, 417 (1866); *see also United States v. Mazurie*, 419 U.S. 544, 554 (1975). ICWA is a valid exercise of this plenary power.

2. ICWA regulates private actors.

This Court has drawn a "sharp distinction" between impermissible regulation directed at the states and permissible "congressional regulation of private persons." *See Hodel*, 452 U.S. at 286. Two categories of such permissible regulation are relevant here. The first consists of laws that "impose[] restrictions or confer[] rights on private actors." *See Murphy*, 138 S. Ct. at 1480. The second consists of laws that "evenhandedly regulate[] an activity in which both States and private actors engage." *See id.* at 1478. ICWA falls within both of these categories.

a. ICWA confers rights on private actors.

When Congress enacts a statute providing individuals or tribes with "federally protected rights," the Supremacy Clause requires states to enforce those rights. *Antoine v. Washington*, 420 U.S. 194, 205 (1975). These rights may take the form of licenses or privileges. *See, e.g.*, *id.*

(upholding a federal statute providing tribe members with hunting rights). They may also take the form of procedural guarantees. *See, e.g.*, *Jinks v. Richland County*, 538 U.S. 456, 467 (2003) (upholding a federal statute tolling limitations periods for state law claims in state court).

ICWA confers rights in the form of procedural guarantees on parties involved in Indian child welfare proceedings. *See* 25 U.S.C. § 1902. For example, ICWA's placement preferences vest Indian children with the right to be placed with Indian families whenever possible. *See id.* § 1915. The Act's provisions granting tribes the right to intervene in cases that involve their members, *id.* § 1911(c), parents the right to be involved in their children's proceedings, *id.* § 1913, and adopted children the right to learn of their tribal affiliations, *id.* § 1917, all similarly represent rights in the form of procedural guarantees.

Further, ICWA's provisions requiring maintenance of records are best understood as ensuring the right of adoptees and tribes to contact one another after the adoptees are separated from their biological parents. *See* 25 U.S.C. § 1951; 25 C.F.R. §§ 23.140–23.141. Maintaining records regarding an adoptee's tribal affiliation is necessary to protect the "rights flowing from the individual's tribal relationship." *See* 25 U.S.C. § 1917. "[T]here is nothing unconstitutional about Congress' requiring certain procedural minima" in order to secure this sort of federally conferred right. *See FERC v. Mississippi*, 456 U.S. 742, 771

(1982); *see also Printz*, 521 U.S. at 908 n.2 (explaining that early federal statutes requiring state judges to perform "ancillary functions of recording, registering, and certifying" citizenship applications did not commandeer states).

The statutes that this Court has invalidated under the anticommandeering doctrine involved no such provision of rights to private actors. In *Murphy*, this Court explained that a statute prohibiting state legislatures from authorizing sports gambling neither "confer[red] any federal rights" nor "impose[d] any federal restrictions" on private actors. 138 S. Ct. at 1481. This Court in *Printz* similarly noted that a statute directing state executive officers to conduct background checks on gun purchasers regulated those officers "not as private citizens, but as the agents of the State." 521 U.S. at 930. The provision at issue in *New York*, which required states to "take title" of radioactive waste, also contained a directive to state governments that conferred no rights on private actors. 505 U.S. at 174–77. By contrast, ICWA confers rights on individuals and tribes; it does not regulate the states as states.

b. ICWA is a statute of general application.

A federal statute does not violate the anticommandeering doctrine if it "do[es] not apply solely to States." *Reno v. Condon*, 528 U.S. 141, 146 (2000). Such a statute presents no anticommandeering concern as long as it treats states and private parties "evenhandedly." *See Murphy*, 138 S. Ct. at 1478; *see also Garcia v. San Antonio Metro.*

Transit Auth., 469 U.S. 528, 554 (1985) (upholding the application of federal minimum wage laws to state employees on the grounds that "other employers, public as well as private, have to meet" the same standards). That a state may have to take some administrative action to comply with a generally applicable statute is "an inevitable consequence" that itself "presents no constitutional defect." *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988).

Insofar as ICWA imposes duties on state executive officials, it does so as a statute of general application that evenhandedly governs both public and private advocates for Indian children. ICWA's rules regarding foster care, for example, apply equally to "[a]ny party seeking to effect a foster care placement of" an Indian child. 25 U.S.C. § 1912(d). These provisions do not regulate states "in their sovereign capacity" but rather establish rules for child advocacy to which both states and private parties must adhere. *See Reno*, 528 U.S. at 151.[3]

Even if ICWA disproportionately affects state agencies, that does not create an anticommandeering problem. In *Reno*, this Court rejected a similar line of argument in a challenge to a federal statute regulating

[3] ICWA's provisions also apply to private foster agencies, which are authorized to provide foster care services in Ames and in the majority of its sister states. *See* Ames Fam. Code § 264.161; *see also* Staff of S. Comm. on Finance, 115th Cong., *An Examination of Foster Care in the United States and the Use of Privatization* 11 (Comm. Print 2017) (noting that 31 of 33 reporting states permit private agencies to provide foster care services).

the use of records generated by state departments of motor vehicles. *See* 528 U.S. at 149–51. Although the law disproportionately affected states, it also affected "private persons who ha[d] obtained [drivers' personal] information from a state DMV." *Id.* at 146. Because the statute was one of general application, the fact that it required substantial "time and effort on the part of state employees" did not violate "the principles laid down in either *New York* or *Printz*." *See id.* at 150. The same logic applies to ICWA, which evenhandedly regulates public and private advocates for Indian children—not just state agencies.

B. Enforcement of ICWA in state courts does not implicate the anticommandeering doctrine.

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. The Court has always understood this clause "to permit imposition of an obligation on state judges to enforce federal prescriptions." *Printz*, 521 U.S. at 907 (emphasis omitted). Therefore, while the anticommandeering doctrine prohibits Congress from conscripting state legislatures and executive officers, *see id.* at 935, it does not curtail Congress' power under the Supremacy Clause "to enlist . . . the judiciary . . . to further federal ends," *FERC*, 456 U.S. at 762.

Congress' broad authority to preempt state law extends to laws governing domestic relations. State family law is "not immune under the

Tenth Amendment" from federal preemption. *See United States v. Oregon*, 366 U.S. 643, 649 (1961). While there is a "presumption against pre-emption in areas of traditional state regulation such as family law," that presumption is overcome where "Congress has made clear its desire for pre-emption." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001). Congress made that desire clear in ICWA, which is designed to preempt state law where the federal standards would better protect the rights of Indian tribes, parents, and children. *See* 25 U.S.C. § 1921.

The cases cited by the Ames Circuit do not stand for the proposition that family law is exempt from congressional power. In *Ex parte Burrus*, this Court simply explained that the custody dispute at issue did not arise under federal law and thus could not give rise to federal question jurisdiction. *See* 136 U.S. 586, 596 (1890). The Court in *Sosna v. Iowa* similarly did not discuss congressional regulation but instead merely noted the "historical fact" that state law generally governs domestic relations. *See* 419 U.S. 393, 559–60 (1975). Neither case forecloses federal regulation in the area of family law.

The Ames Circuit also erred in concluding that ICWA violates the anticommandeering doctrine by "requiring the application of federal standards within state-law causes of action." *See* J.A. at 10. This Court rejected a similar argument in *Jinks*, where it held that a federal statute requiring state courts to toll limitations periods for state-law claims did

not violate "principles of state sovereignty." *See* 538 U.S. at 464–65. This Court also repeatedly has upheld federal preemption of community property laws that affect state-law causes of action. *See Boggs v. Boggs*, 520 U.S. 833, 852–53 (1997) (collecting cases). When state courts have jurisdiction over Indian child welfare proceedings, they "are not free to refuse enforcement" of ICWA's standards. *See Testa*, 330 U.S. at 394.

Finally, ICWA's use of directive language does not change the anticommandeering analysis. Such language "might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is phrased." *Murphy*, 138 S. Ct. at 1480. Congress frequently uses directive language in reference to state courts. *See, e.g.*, 50 U.S.C. § 3938(a) ("[T]he court shall require that the temporary [child custody] order shall expire not later than the period justified . . . ."); 20 U.S.C. § 1439(a)(1) ("[T]he court shall . . . bas[e] its decision on the preponderance of the evidence."); 36 U.S.C. § 220509(a) ("[A] court shall not grant injunctive relief against the corporation within 21 days . . . ."). Invalidating ICWA based on its phrasing would elevate form over substance and give short shrift to Congress' power to demand, "explicitly or by implication," that state courts "take account of federal law." *See Printz*, 521 U.S. at 929 n.14.

C. ICWA does not implicate the rationales that animate the anticommandeering doctrine.

In *Murphy*, this Court highlighted three rationales underlying the anticommandeering doctrine. 138 S. Ct. at 1477. First, the doctrine seeks to protect individual liberty by balancing power between the states and the federal government. *Id.* Second, it aims to promote political accountability by ensuring that voters "know who to credit or blame" for policies. *Id.* And third, it acts to prevent Congress from burdening the states with the costs of a federal program. *Id.* ICWA does not conflict with any of these rationales.

First, ICWA does not implicate structural liberty concerns. The anticommandeering doctrine does not "protect the sovereignty of States for the benefit of the States or state governments as abstract political entities." *Id.* at 1477 (quoting *New York*, 505 U.S. at 181). Rather, it seeks to safeguard individual liberty through the structure of federalism.

This structural protection rationale does not, however, apply with the same force to members of federally recognized tribes. Tribes and their members historically have "owe[d] no allegiance to the states, and receive[d] from them no protection." *See United States v. Kagama*, 118 U.S. 375, 384 (1886); *see also Yakima Indian Nation*, 439 U.S. at 501 (noting that states, unlike the federal government, do not have a trust relationship with tribes). This lack of state protection was evident in

Indian child welfare actions prior to the federal government's passage of ICWA. *See Holyfield*, 490 U.S. at 45. When Congress enacted ICWA, it "perceived the States and their courts as partly responsible for the problem it intended to correct." *Id.* Accordingly, Congress sought to confer protections on Indian individuals and tribes involved in child welfare actions. ICWA's provision of rights does not present the kind of threat to individual liberty that the anticommandeering doctrine seeks to prevent.

Second, ICWA creates no confusion about political accountability. The federal government long has legislated in the area of Indian affairs to fulfill its "unique obligation toward Indians." *See Mancari*, 417 U.S. at 555. Because ICWA is part of this longstanding practice, there is little risk that citizens mistakenly will hold states responsible for its provisions. ICWA only governs child welfare actions involving Indian children. By contrast, the statutes that this Court invalidated in *Murphy*, *Printz*, and *New York* imposed statewide policies that affected all citizens. Whereas that sort of broad direction of state policy may raise questions of political accountability, ICWA's narrow application to Indian children does not.

Finally, ICWA does not impermissibly shift costs to the states. This Court rejected a similar challenge in *Reno*, where South Carolina argued that a statute that restricted its "ability to disclose a driver's

personal information without the driver's consent" impermissibly "thrust[] upon the States all of the day-to-day responsibility for administering its complex provisions." 528 U.S. at 144–50. This Court held that merely "requir[ing] time and effort on the part of state employees" did not constitute commandeering. *Id.* at 150. Similarly, in *Baker*, this Court upheld a statute that effectively prohibited states from issuing unregistered bonds, because requiring states to take administrative action to comply with "federal standards regulating [an] activity is a commonplace that presents no constitutional defect." 485 U.S. at 515.

Like the statutes at issue in *Reno* and *Baker*, ICWA imposes incidental costs that do not raise anticommandeering concerns. For example, ICWA's provision requiring state courts to maintain and disclose adoption records places no additional burden on Ames, which already requires such disclosures under state law. *See* Ames Fam. Code § 108.003. Furthermore, the federal government assumes some costs associated with administering ICWA. *See* 25 C.F.R. § 23.13 (legal fees for counsel appointed under ICWA in involuntary custody proceedings in state court); *id.* §§ 23.81–23.83 (assistance in identifying expert witnesses, identifying language interpreters, and locating biological parents of an Indian child when required under ICWA). The minimal costs that states do incur in complying with ICWA do not constitute the

sort of unconstitutional cost-shifting that the anticommandeering doctrine seeks to prevent.

* * *

Congress cannot order state legislatures to pass certain laws or demand that state executive officers pursue certain policies. But it can preempt state law and enact statutes that apply with equal force to public and private actors. The federal standards established by ICWA are a valid exercise of this power. As such, ICWA does not violate the anticommandeering doctrine.

III. Any Provision of ICWA Deemed Unconstitutional Would Be Severable.

"[W]hen confronting a constitutional flaw in a statute," this Court "prefer[s] . . . to sever its problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328–29 (2006). The Court severs unconstitutional provisions so long as the remaining provisions "will function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted). When a statute contains a severability clause, there is "a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Id.* at 686. Indeed, "unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute." *Id.*

Congress included a severability clause in ICWA, evincing its intent that the validity of the statute as a whole not depend on any given provision. *See* 25 U.S.C. § 1963. ICWA provides tribes and individuals with a variety of procedural guarantees. These provisions operate independently of one another and would function as Congress intended even if other portions of the statute were removed. Thus, if this Court were to deem any provision of ICWA unconstitutional, the appropriate remedy would be to sever the offending provision and leave the remainder of ICWA intact.

CONCLUSION

The judgment of the United States Court of Appeals for the Ames Circuit should be reversed.

October 11, 2019

Respectfully submitted,

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APPENDIX

U.S. Const. art. I, § 2, cl. 3 provides:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

U.S. Const. art. I, § 8, cl. 3 provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

U.S. Const. amend. X provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. XIV provides in relevant part:

> **Section 1**: . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> **Section 2**: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .
>
> . . .

Indian Child Welfare Act, 25 U.S.C. §§ 1901–63, provides in relevant part:

§ 1901—Congressional findings

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
>
> . . .
>
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

§ 1902—Congressional declaration of policy

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

§ 1903—Definitions

. . .

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native . . . ;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . ;

. . .

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . ;

. . .

§ 1911—Indian tribe jurisdiction over Indian child custody proceedings

. . .

(c) State court proceedings; intervention
In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

. . .

§ 1912—Pending court proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation
In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of

their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

(b) Appointment of counsel

In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child. Where State law makes no provision for appointment of counsel in such proceedings, the court shall promptly notify the Secretary upon appointment of counsel, and the Secretary, upon certification of the presiding judge, shall pay reasonable fees and expenses out of funds which may be appropriated pursuant to section 13 of this title.

. . .

(d) Remedial services and rehabilitative programs; preventive measures

Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

. . .

§ 1915—Placement of Indian Children

(a) Adoptive placements; preferences
In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences
Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

. . .

(e) Record of placement; availability
A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

§ 1917—Tribal affiliation information and other information for protection of rights from tribal relationship; application of subject of adoptive placement; disclosure by court

Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.

§ 1951—Information availability to and disclosure by Secretary

. . .

(b) Disclosure of information for enrollment of Indian child in tribe or for determination of member rights or benefits; certification of entitlement to enrollment
Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership . . . .

Indian Child Welfare Act Proceedings, 25 C.F.R. §§ 23.1–23.144, provides in relevant part:

§ 23.132—How is a determination of "good cause" to depart from the placement preferences made?

(a) If any party asserts that good cause not to follow the placement preferences exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing to the parties to the child-custody proceeding and the court.

(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.

(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian

community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.

(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.

(e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

§ 23.141—What records must the State maintain?

(a) The State must maintain a record of every voluntary or involuntary foster-care, preadoptive, and adoptive placement of an Indian child and make the record available within 14 days of a request by an Indian child's Tribe or the Secretary.

(b) The record must contain, at a minimum, the petition or complaint, all substantive orders entered in the child-custody proceeding, the complete record of the placement determination (including, but not limited to, the findings in the court record and the social worker's statement), and, if the placement departs from the placement preferences, detailed documentation of the efforts to comply with the placement preferences.

(c) A State agency or agencies may be designated to be the repository for this information. The State court or agency should notify the BIA whether these records are maintained within the court system or by a State agency.